THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. XI, No. 17 MAY, 1935 PAGES 385-408

COMPLETE NUMBER, 228

Published by

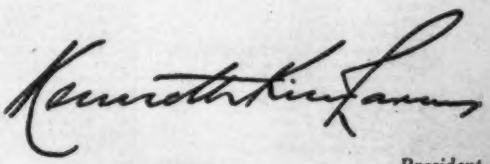
THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation and maintenance of corporations, is to deal with members of the bar, exclusively.

WILLIAM P. POWELL

There is an empty place among The Corporation Trust Company's officers, and sorrow in all our hearts. William P. Powell, one of us for a quarter of a century, died April 6th. He was Editor of this publication, and its growth and popularity was very much a personal achievement.

The work he did in the early days of our loose-leaf services will live long; he gave them character, developed a technique for them, and all that they become in the future will be the result of the foundations he so brilliantly laid for them.



President.

THE CORPORATION JOURNAL

VOL. XI, No. 17 MAY, 1935 PAGES 385-408

The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for May

Page

Amendment and Revision of Charters and By-Laws . . 389

Digests of Court Decisions, etc.

Domestic Corporations 390

Foreign Corporations 395

Taxation 401

Corporate Meetings Held 404

Some Important Matters for May and June 404

Amendment and Revision of Charters and By-laws

R. A. MacLean

Within the last few years many old requirements and restrictions of the corporation laws of various states have been removed, in some cases by amendment of the existing corporation laws, in other cases by the substitution of entirely new corporation acts applying to existing, as well as new, corporations. On the other hand the new or amended statutes expressly permit charter or by-law provisions for enlarged powers or greater freedom of action. Consequently, if a corporation formed several years ago has never amended its charter or by-laws, it will, in all probability, still be limited by old restrictions and requirements which are no longer imposed under the modern statutes, and will lack the appropriate provisions to take advantage of the statutory authority for more favorable and convenient regulations.

Requirements such as the following have been eliminated in many states: that stockholders' meetings be held within the state, that a long period of notice be given for stockholders' meetings, that directors be stockholders or that one or more directors are to be residents of the state.

As instances of the new favorable and convenient features which may be applied, if so provided in the certificate of incorporation or by-laws, the following may be cited: a quorum of directors may be less than a majority, vacancies in the board of directors may be filled by the remaining directors, a wasting-assets corporation, such as a mining company, may declare dividends without considering depletion of assets, a record date may be fixed for determination of shareholders entitled to vote or to receive dividends, etc., shareholders may act by unanimous written consent without a meeting, or the pre-emptive rights of stockholders may be limited or denied.

There is a tendency in the new corporation acts to permit the regulation of many matters by by-law provisions, as was done in the drafting of the Ohio general corporation act, which supplies many orderly and practical rules to be applied only where the matter is not otherwise regulated by the by-laws.

In making any revision of articles of incorporation and by-laws, distinction should be made between matters which are required to be authorized in the articles of incorporation and those which may be regulated in the by-laws without any express authority therefor in the articles of incorporation. It should be determined how far it is permissible to go in revising articles of incorporation or by-laws which were prepared several years ago, by comparing them with the most modern forms which contain all the practical and convenient provisions permitted by the present statutes.

Domestic Corporations

California.

A corporation may not appear as attorney or in propria persona. This action was filed by a corporation "in propria persona." The United States District Court, N. D., California, S. D., granting the motion to dismiss on the ground that a corporation may not appear as attorney or in propria persona says: "It is settled in California that there are certain professional occupations which a corporation is functionally incapable of engaging in, such as the practice of the law. Plaintiff corporation is not, and could not be, a member of the bar of California, whose members, under our rules, may be admitted to practice in this court. Obviously plaintiff corporation could not plead and manage its case personally, as provided in USCA Sec. 394, nor could it manage it through an agent of its appointment who is not an attorney of the court." *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co. of Philadelphia*, 9 F. Supp. 175. Mullin-Johnson Co. in pro. per. David Freidenrich, of San Francisco, for defendant. Livingston & Livingston, of San Francisco, amicus curiae.

Delaware.

Valuing assets for purpose of determining whether or not such assets are in excess of capital for dividend purposes. The Delaware law provides that a corporation may declare dividends "out of its net assets in excess of its capital" or in case there is no such excess out of its net profits for the fiscal year then current and/or the preceding fiscal year. The charter of the corporation here involved gives voting power to the Class A Common stock only except that if the stipulated dividend on the preferred stock shall not have been paid for two semi-annual periods or the required sinking fund payments shall not have been made for two periods the preferred stock shall have the sole voting privilege until the two arrearages shall have been paid. An election of directors was held in 1933, Class A Common stockholders, only, voting. It was contended that there had been default in dividend and in sinking fund payments for the periods. Proof was not forthcoming as to the sinking fund payment default. There had been a dividend payment within the year, admittedly, on the excess of assets over capital basis; this, it was contended, was unlawfully declared since there was no such excess. It was argued that it was a dividend payment nevertheless even if unlawful. The Delaware Court of Chancery, New Castle County, rules against this. But—on the basis of cost of assets there was an excess of assets over capital and so, it was urged, the dividend declaration was valid. The court holds that the assets for surplus purposes are not to be measured by cost but with due allowance for depreciation in value, as, indeed, is recognized by Section 34 of the General Corporation Law. Considering depreciation of assets there was no surplus. Dividend was not lawfully declared. "Un-

less preferred dividend defaults have been cured, the preferred stockholders are the only ones entitled to vote." *Vogtman, Sr. v. Merchants Mortgage and Credit Co., et al.*, decided March 8, 1935. Harry Rubenstein, of Wilmington, for complainant. Christopher L. Ward, Jr., of the firm of Marvel, Morford, Ward and Logan, and William H. Bennethum, all of Wilmington, for defendants.

The Delaware Corporation Law was amended in several respects by the 1935 Legislature. **See page 408.**

Indiana.

Right to bring action against receiver of corporation for damages on account of injuries received prior to appointment of receiver by virtue of alleged negligence of employee of corporation. The action, here, against a receiver, such an action as is indicated by the caption, was abated by the court below. The Appellate Court of Indiana, in Banc, reverses, and, after voting that there exists in appellant a right of action, says: "The judgment, if any, on that right of action, after trial, can only be levied against the assets of the corporation in the hands of the receiver as such. Against whom, then, should such cause of action be brought? Against the one who has custody of the assets and who is an officer of the court—the receiver. * * * A right of action has accrued here, and we do not think the recovery thereon should be defeated merely because the property and assets of the tort-feasor has been taken over by a court of equity. Equity would not permit such a travesty on justice, for such a precedent would cause countless persons to be without a remedy on account of injuries received, because those causing the injury would immediately go into receivership and defeat the rights of those injured to recover for such injuries. Thus the receiver is the proper person to be sued in the case at bar." *Martin v. Forrey*, 193 N. E. 679. Wm. H. Faust, W. H. Harrison, Irene Faust and Joseph O. Carson, II, all of Indianapolis, for appellant. M. E. Foley and B. E. Sattler, both of Indianapolis, for appellee.

Kansas.

Cancellation of stock because of non-payment of subscription price. Kansas Rev. St. 1923, 17-606 provides for the cancellation of stock in the event of non-payment of any installment of the subscription; notice is to be served on the stockholders of the intention to cancel if payment is not made at the time and place specified in the notice. Here, stock was subscribed for by one who subsequently died. Payment had not been made. The corporation was adjudged a bankrupt. The trustee in bankruptcy brought this action against the administratrix of the dead man's estate for the amount of the stock subscription. The defense was that the stock had been cancelled for non-payment. Reversing the court below, the Supreme Court of Kansas directs that judgment be entered for the plaintiff. The court says: "Where the statute sets out just how stock may be

cancelled, the cancellation must be carried into effect in substantial compliance therewith. In this case no notice whatever was given the stockholder nor was any other attempt made to comply with the statute." *Jent v. Friggeri*, 40 P. (2d) 343. M. B. Munson, of Pittsburgh, for appellant. E. V. Bruce, of Pittsburgh, for appellee.

Louisiana.

Unless specifically authorized, officer of a corporation is without authority to sign corporation's name as accommodation indorser. Suit by payee and holder of two notes against a corporation as accommodation indorser of the notes. There was no express authority given to the officer who signed as accommodation indorser on behalf of the corporation either by resolution of the board of directors or by the charter so to do. There was lack of implied authority; there was no continuity of the practice. "The notes in question represent the only instance when this was done." The Supreme Court of Louisiana, affirming the judgment below, dismissing the suit says: "Acts of indorsements and guarantees by officers of corporations are generally held to be ultra vires, unless the corporation is authorized in its charter to obligate itself. The reason for the rule is that this is a dissipation or diversion of the funds of the corporation for a purpose other than that authorized by the charter of the corporation." *Proctor v. Opelousas Ins. Agency*, 158 So. 627. Spencer, Gidiere, Phelps & Dunbar, of New Orleans, for appellant. W. C. Perrault, of Opelousas, amicus curiae, for appellee.

Mississippi.

Change of corporation's domicile. On November 3, 1888, under Chapter 38, Section 1027 et seq., Mississippi Revised Code of 1880, Tchula Co-operative Store was granted a charter, which recites inter alia: "The domicile of said company shall be at Tchula, Holmes County, Miss., or at such other place as the majority of the stockholders in value may determine." The domicile was thereafter changed several times by proper vote of the stockholders. It was contended, here, that the stockholders were without the power to change the corporation's domicile. (This is the only point we touch on.) The Supreme Court of Mississippi, Division A, affirming the judgment below, says: "By Chapter 38, Sec. 1028, Rev. Code 1880, corporations were granted charters, upon complying with certain conditions, when approved by the Governor upon the advice of the Attorney General and attested by the Secretary of State, but this section does not require a domicile to be named in the charter. Section 1031 thereof defines the powers of the corporations so created, but in no way undertakes to regulate or control the stockholders as to the fixing of a domicile. We think, therefore, that the language of this charter relative to its domicile was not prohibited by any statute and that the grant to the stockholders to change its domicile was a matter of internal management which did not require an

amendment of the charter. * * * The grant here under consideration in nowise violates the statutes or Constitution of this state. * * * This grant or right to change the domicile is not inimical to public policy or private right." *Estes v. Bank of Walnut Grove et al.*, 159 So. 104. O. B. Triplett, Jr. of Forest and Wm. I. McKay of Vicksburg for appellant. W. T. Weir of Walnut Grove, for appellee Bank of Walnut Grove. Green, Green & Jackson of Jackson, and Dufour, St. Paul, Levy & Miceli of New Orleans, La., for appellees.

Nebraska.

Purchase and sale of its own stock by a corporation. In January, 1927, at a time when defendant corporation was being pressed by its creditors for payment of their claims, its president, whose estate plaintiff represents, sold his stock in the company to the company for $8,876.66, payable $887.66 in cash or its equivalent, and the balance in thirty monthly instalments represented by the company's promissory notes, the president then terminating his connection with the company. Some months later in 1927 he commenced a suit against the company on the notes given and obtained a judgment for $2,055.71. The company later underwent a reorganization and plaintiff administratrix in 1933 commenced this action and attacked the sale of the assets of the old company to the reorganized company as a fraud against her as a general creditor and seeks to have the assets of the reorganized company subjected to the judgment for $2,055.71.

The court, after examining the events leading to the reorganization found that the organizers acted in good faith, that plaintiff's intestate had been given notice of their actions and that, four years having elapsed since the alleged fraud had taken place, the transactions were barred by the statute of limitations. Judgment for the defendant was affirmed. With regard to the purchase of the stock by the company, the court said:

"That the company had the right to purchase its own stock is not seriously disputed. The weight of authority seems to be that, if it does not appear to be in bad faith and injurious to the rights of its creditors or stockholders, a corporation, when not prevented by its articles or by statute, may buy and sell its own stock, and hold, issue, or retire the same. * * * That the sale of the stock to the corporation in the case at bar was injurious to the rights of creditors is amply shown by the evidence. In such cases, the weight of authority seems to be that, while a corporation may contract to purchase its own stock, it may not later, upon insolvency, pay for it until after the existing creditors have been paid." *Nipp v. Puritan Manufacturing & Supply Co. et al.*, 259 N. W. 53. Hugh A. Myers and W. A. Ehlers, both of Omaha, for appellant. Waldron, Newkirk & Mathews, David O. Mathews and E. B. Zabriskie, all of Omaha, for appellees.

Nebraska.

Redemption of preferred stock with accrued cumulative dividends on demand. One of the articles of incorporation of the defendant corporation provides for redemption of preferred stock on request at least ninety days before the end of the fiscal year, payment at par with accrued cumulative dividends within thirty days after end of fiscal year. Another article provides for the creation of a sinking fund from earnings for purpose of redemption of preferred stock but not for dividends. Certain preferred shares were presented for redemption at par plus accrued accumulative dividends. For some reason the corporation refused to redeem. Suit was brought; judgment for plaintiff. Then other preferred stockholders filed an application to vacate the judgment; granted. Interveners alleged that the two articles referred to above were invalid, and as then the reasonable value of the corporation's assets was less than that of the preferred stock issued and outstanding to allow plaintiff to recover on his holdings he would secure an unfair advantage. At the time plaintiff presented his shares for redemption the assets far exceeded liabilities. Judgment again for plaintiff. The Supreme Court of Nebraska affirms. The court says: "The provisions of the articles of incorporation and stock certificate for the repurchase and redemption of preferred stock together with the general law, evince a contract between the corporation and the holder of such stock. Such an agreement is valid and enforceable where it appears that such redemption will not impair the rights of the corporate creditors." It is said further: "There is no requirement that the accrued dividends must be declared before they can be recovered. The stock having been transferred prior to the dividends in question having been declared, and there being no agreement to the contrary, the transferee became entitled to the dividends as an incident to the ownership of the stock." *Ammon v. Cushman Motor Works (Beezley et al., Interveners)*, 258 N. W. 649. George I. Craven and Skiles & Skiles; all of Lincoln, for appellants. Perry, Van Pelt & Marti and J. P. O'Gara, all of Lincoln, for appellees.

New Jersey.

Trade names and unfair competition; "Lackawanna." The complainant here (D. L. & W. R. Co.) seeks a preliminary injunction against the defendant from using the word "Lackawanna" as part of its name. For "at least thirty years" the word has been emphasized by the railroad aside from its corporate or official name, in connection with the railroad itself and its various transportation agencies. The contention is that as to the railroad and its agencies the word has become familiar as a trade-name; that though it is a geographical name, it has acquired a secondary meaning; the railroad has established a property right in the name. Defendant states that it has been operating the same lines for approximately six years and that during that time no protest or objection has been raised by the complainant against defendant's use of the name. Complainant and

defendant operate over courses that are practically the same. Decree for complainant. (Court of Chancery of New Jersey). *Delaware L. & W. R. Co. v. Lackawanna Motor Freight Lines, Inc.*, 175 A. 905. Frederic B. Scott, of New York City, for complainant. Frank H. Eggers, of Jersey City, for defendant.

Oklahoma.

On bringing of action by corporation in arrears for state license tax for several years. Action by an Oklahoma corporation on two promissory notes. It was agreed in open court that the plaintiff had not paid the license tax to the Corporation Commission of the State of Oklahoma for three years. Inter alia, as defenses, it was urged that because of the arrears the corporation had no right to maintain the action. Affirming the judgment below for plaintiff, the court says, on the point here covered: "The case of *Polson v. Revard*, 104 Okl. 279, 232 P. 435, cited and relied on by defendant, is not in point because in that case there had been a suit instituted by the state and a judicial determination, forfeiting the charter. In the case at bar, the state had not seen fit to bring an action to forfeit the charter, and the defendant cannot be heard to complain until plaintiff's charter has been forfeited by the state." *Ray v. Oklahoma Furniture Mfg. Co.*, 40 P. (2nd) 663. Erwin & Erwin, of Wellston, for plaintiff in error. T. G. Chambers, Jr., of Oklahoma City, for defendant in error.

Foreign Corporations

Arkansas.

Doing of business and service of process on foreign corporation. Defendant corporation employed a traveling salesman in Arkansas who visited customers, took their orders, which were filled from outside the state and delivery made by trucks not belonging to the company. The salesman also acted as collection agent for the company. He maintained an office within the state. In instances where customers refused to accept goods which they had ordered, it was the salesman's practice to call for them and to resell them. He also had authority to intercept shipments to customers where there was doubt of their ability to make payment. The court said:

"We think this evidence is sufficient to show that the appellee is doing business in the State of Arkansas and that the service on Westerfield (the salesman) was valid. He has an office where he takes orders over the telephone; any merchandise that is refused by the person to whom it was sold is taken by him and sold to others, or as he says, 'peddled to others.' Appellees contend that they were engaged in interstate commerce, and that Westerfield was merely a salesman. This would be true if Westerfield did nothing but receive orders and transmit them to the company in Kansas City; but, as we have said, he did more than this. Besides keeping an office where he received orders, in all cases where a purchaser declined to take

"Amateur" Corpon

To be transacting business in any state as a foreign corporation—that is as a corporation from another state—is not the complicated or troublesome or expensive affair that many corporations are making it, if handled expertly and efficiently. The principal cause of the troubles some corporations experience is "Amateur" representation—statutory representation in a state by men able and experienced in the company's business matters, perhaps, but totally unfamiliar by the very nature of their abilities and experience, with statutory requirements as to papers served and what to do with them, reports to be filed, forms for them, and the purpose and importance of them, taxes to be paid and the methods of computing them. This unfamiliarity—plus, sometimes, a feeling that all such matters are insignificant in comparison with sales, manufacturing, merchandising and financial matters—is from time to time involving the companies using such representation in friction with the state that requires special

nte Representation

legal counsel to settle, in over-taxation that often is never discovered, and frequently in penalties that should have been unnecessary.

When statutory representation of a foreign corporation in any state is in the hands of The Corporation Trust Company, its details are attended to by men who are specialists in that one job —and who have no other and more important line of business to divide attention with. Bothers, annoyances, and friction with State officials, are thus cushioned in an organization of experts with forty years' acquaintance with the work to be done.

The cost per year for having such service in any state rendered through your regular attorney is so small that the cost of straightening out one serious delinquency arising from inexperienced representation would, in most cases, more than overshadow it.

Read at the left the details of this service, then write us for a discussion of its application, through your attorney, to your own business today.

RUST COMPANY SERVES ORPORATION MATTERS

he needs for correct preparation of papers. When the papers are completed The Corporation Trust Company then has them filed and recorded for him at the required places without an hour's unnecessary loss of time.

After qualification this company furnishes the agent required in the state for service of process and keeps the corporation's attorney informed of all taxes to be paid and reports to be filed by his client to maintain its corporate standing in the state; informs him promptly of any changes in law, rulings by officials, or decisions of courts, that affect his client's interests.

In addition, but without additional charge, The Corporation Trust Company furnishes to the attorney, or upon his request, to the corporation itself (sending to that officer or employee of the company designated by the attorney) its Corporation Tax Service, State and Local. This Service presents, in loose-leaf form kept constantly up-to-date, complete information in regard to the Franchise or License Taxes, the Income Taxes, the General Property Taxes, and any other taxes, state or local, applying to ordinary business corporations, in each state in which the company is represented. For each such tax this Service shows of what corporations the tax is required, exemptions, basis of tax rate, when to be paid and to whom, how to obtain extensions, how and where to appeal from the assessing official or body, reports and returns required and where and when to be filed, and all the applicable official opinions, rulings, definitions and court decisions, and text of all law sections governing.

It is such completeness of service, which probably no other organization could ever equal, that has resulted in The Corporation Trust Company today serving in a statutory capacity, under appointment of counsel, more than ten thousand corporations, many of them the largest institutions of their kind in the world.

the merchandise shipped to him, Westerfield repossessed the merchandise, and sold it just as any merchant in Arkansas would sell merchandise. * * * We hold that Cudahy Packing Company is doing business in Arkansas." *Berryman et al. v. Cudahy Packing Company,* 76 S. W. (2d) 956. Robert Bailey, of Russellville, for appellants. Hays & Smallwood, of Russellville, for appellees.

Illinois.

Refund of franchise tax. Appellant corporation had paid $1,000 in each of two years as its franchise tax and had brought a chancery action to restrain payment of the tax into the state treasury, in which it was contended that only approximately $600 was due for each year. It was held by the chancery court that the secretary of state was without lawful authority to insist upon payment of $1,000 each for the two years in question and it was ordered that the excess over the $600 amounts be refunded.

On this appeal, appellant urged that the holding of the trial court that the claim for $1,000 was "unlawful," entitled it to a return of the entire sum deposited, that the assessment was void and could not be corrected and that the full sum should be returned.

The court held, however, that the franchise tax in question is to be regarded as imposed directly by the Legislature and that the duties of the secretary of state in determining the amount due "were purely ministerial, and but for a difference of opinion as to the proper interpretation of the applicable law the appellant would have paid the tax upon the figures submitted by itself. When that difference arose, the appellant chose to take advantage of the act of the Legislature intended for its benefit. It paid the entire amount and pursued the equitable remedy, thus risking no penalties and being assured of a judicial determination of its contentions. In return, it necessarily offered to do equity. That offer, which is a condition of every equitable prayer for relief, it would now recant, but we cannot permit its withdrawal. It prayed in its bill that the court should make 'an appropriate decree' concerning the disposition of the money paid, and that is exactly what the court has done. There is no cause for complaint and no merit in the appeal from that order." *Libby, McNeill & Libby v. Stratton,* 194 N. E. 572. Albert H. & Henry Veeder, of Chicago (Maurice Weigle, of Chicago, of counsel), for appellant. Otto Kerner, Atty. Gen. (Joseph A. Londrigan, of Springfield, of counsel), for appellee.

Mississippi.

Service of process, on former agent, on behalf of foreign corporation, then withdrawn from state. Appeal from a judgment sustaining a plea to the jurisdiction of a Mississippi court. Appellee is an Illinois corporation engaged in the manufacture and sale of candy; it qualified as a foreign corporation in Mississippi, appointing an agent for purposes of service of process. The declaration seeks to recover

damages alleged to have been sustained by reason of breach of implied warranty; candy purchased of a Mississippi dealer and partially consumed, contained glass, so it was alleged. Subsequently, the corporation withdrew from Mississippi and cancelled the agent's appointment. Thereafter the action was brought. Affirming the judgment below, the Mississippi Court, Division A, says: "The great weight of authority supports the view that where a foreign corporation is duly authorized to do business in a state, and has appointed a resident agent for the service of process, the withdrawal of the corporation from the state does not revoke the authority of the agent to receive service, and does not deprive the courts of that state of jurisdiction in an action on a liability arising in the state out of business done by the foreign corporation therein. * * * For the purpose of this decision only, we will assume that the rule as above stated would be followed in this state, and that as to any liability connected with, or arising out of or having a basis in, any business done in this state, an attempted withdrawal would be ineffectual, but, if so, we think it should be limited to that character of actions, and that it would have no application where it is not made to appear that the alleged liability was in some way incident to or connected with business done in this state. As to any liability not incident to or connected with business done in this state, the withdrawal from the state and revocation of the authority of the agent would be effectual, and the rights of the foreign corporation would be the same as if it had never entered the state to do business. * * * In so far as the record discloses, the sale of the candy in question may have been solely in interstate commerce between a foreign corporation and the retail merchant who delivered the candy to the appellant, and, upon these facts, we think the court below committed no error in sustaining the appellee's plea to the jurisdiction of the court." *N. T. Walters v. Curtis Candy Company*, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 133291.

Oklahoma.

Taxation of refrigerator cars owned by a foreign corporation. Defendant foreign corporation contended that its refrigeration cars, moving in interstate commerce through plaintiff's county, had not obtained a situs for ad valorem tax purposes, so as to be subjected to such taxation in Oklahoma. It was pointed out that the statutes of Oklahoma subject "all property within the state" to taxation, unless expressly exempt, and the court determined that refrigerator cars used in the state were not to be regarded as exempt merely because they were owned by foreign corporations. *Pottawatomie County v. Armour & Co.*, 40 P. (2d) 1096. Clarence Tankersley, County Atty. of Shawnee, J. Berry King, Atty. Gen. and W. C. Lewis, Asst. Atty. Gen., for plaintiff in error. Keaton, Wells, Johnston & Barnes, of Oklahoma City, David L. Krebs, Jr., of Chicago, Ill., Harry B. Bogg, Jr., of New York City, and Arthur E. Bristol, of Chicago, Ill., for defendant in error.

New York.

Foreign collection agency doing business in New York. Action by a foreign collection agency (a foreign corporation not licensed to do business in New York) against a New York client for certain fees and charges pursuant to a written contract. Defense is the doing of business regularly in New York without license. Plaintiff's business is the collection of overdue accounts receivable, supplying of credit information, adjustments, etc. Plaintiff has an active bank account in New York where it maintains an office, is listed in building and telephone directories, maintains a staff of salesmen and has entered into many contracts which the Municipal Court of City of New York, Borough of Manhattan, Fourth District, finds to be New York contracts, since "it is established that from negotiations to execution New York was the locus" although the acceptance signed by the client accompanied, in the present case, by check for $500 which was deposited by its representative to credit of plaintiff's New York bank account, carried, in print, the following: "In witness whereof the company has executed and attested these presents at the City of St. Louis, to be effective from the date the acceptance is received at the office of the company at St. Louis, Mo." The court holds that plaintiff was doing business in New York, that the contract was made in New York, and that the rights that spring from the contract were not the outgrowth of interstate commerce or communication. Complaint dismissed. *American Security Credit Co. v. Empire Properties Corporation*, 276 N. Y. S. 970. Edgar I. Ahrweiler, of New York City, for plaintiff. Samuel Komoroff, of New York City, for defendant.

Texas.

Basis of franchise tax; meaning of "surplus". The appellant foreign corporation seeks a permanent injunction against the secretary of state and the attorney general to prevent a cancellation of its permit to do business in Texas and the collection of a franchise tax in excess of the amount appellant contends is due by it under the law.

The "surplus" of corporations being one of the items comprising the basis for the franchise tax, the corporation contended that an item reported to the secretary of state as "appreciated surplus" should not be included in the basis of the tax.

The item in question represented an oil lease owned by appellant on about 10,000 acres of land in Texas. Its geologist, in filing a statement with the secretary of state under the Blue Sky Law, had represented that the return to the company, after deducting the cost of production, would be $42,000,000. On the basis of this estimate, the company had entered upon its books an "Unrealized Appreciation" of $24,337,121.77 and had reported to the secretary of state for franchise tax purposes an "unrealized appreciation" of $25,702,747.81. The court said:

"It is appellant's contention that said item represented merely an estimated surplus, or hoped for gain, which might or might not be realized in the future under the contingencies and uncertainties of developing a newly discovered oil field; and could not, therefore, be properly included as surplus of the corporation as a basis for calculating a franchise tax due by it to the state. * * * The Legislature did not undertake to define what is meant by the term 'surplus'.

"In the instant case we think that any strict or technical definition of the term 'surplus' as used in the statute should not be applied, but one which would effectuate the legislative intent. However carried on its books, the Matagorda county lease, a newly discovered field, was a very valuable asset of the corporation, estimated and represented by appellant itself to have a net value of from $20,000,000 to $42,120,000. Obviously the lease afforded appellant both a potential and actual opportunity of vast and extensive proportions in carrying on its business in this state. The value of its privilege or franchise was increased accordingly. And this value, fixed by appellant, was obviously the basis on which the state's tax was intended to be computed. The fact that this full estimated or appraised value might not eventually be fully realized is not determinative of the amount of the tax. It is clear that appellant anticipated a volume of business resulting from such asset, a potential income, far beyond a normal use of its capital stock, and enjoyed a privilege far more valuable than that measured by its capital stock alone. Regardless of the classification of such item made by it upon its books, under the decisions above cited, and the obvious purposes of the Legislature as expressed in articles 7084 and 7089, R. S. as amended (Vernon's Ann. Civ. St. arts. 7084. 7089), we think the Secretary of State properly took the value placed thereon by appellant in its report into consideration in computing the amount of the franchise tax due the state by appellant." *United North & South Development Co. v. Heath, Secretary of State, et al.*, 78 S. W. (2d) 650. E. E. Weiss and R. B. Ellis, both of San Antonio, for appellant. Jas. V. Allred, Atty. Gen., and Sidney Benbow and Wm. N. Sands, Asst. Attys. Gen., for appellees. Karl F. Griffith, Roy C. Coffee and Jack Toone, all of Dallas, amici curiae.

Taxation

Illinois.

Retailer's Occupation Tax Act. The Act of the Illinois legislature approved June 28, 1933, effective July 1, 1933, imposes a tax on persons engaged in the business of selling tangible personal property at retail. Section 1 defines a "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." The Supreme Court of Illinois holds that the tax

(1) is not to be exacted by public utilities furnishing gas, electricity, or water, thus reversing the court below. *People's Gas Light &*

Coke Co. v. Ames, Director of Finance, and two other cases, 194 N. E. 260;

(2) is to be exacted from mine operators selling coal to consumers though in car load lots or more, thus affirming the court below. *Franklyn County Coal Co., Inc., et al. v. Ames, Director of Finance,* 194 N. E. 268;

(3) is not to be exacted from sellers of heating and plumbers supplies to contractors who install same in buildings under construction or repair, thus affirming the judgment below. *Bradley Supply Co. et al. v. Ames, Director of Finance,* 194 N. E. 272.

Indiana.

Act imposing tax on motor carriers employing motor vehicles in transporting property over public highway for hire held valid. The tax is imposed by Chapter 153, Indiana Acts of 1933. The rate is $1. per 100 pounds of actual gross weight, fully equipped for transportation of freight. Applies to motor trucks, etc., engaged in the business of transporting property for hire whether in intrastate or interstate business. Exemptions are: vehicles used exclusively within incorporated limits of any city or town and its suburban territory; carriage of U. S. mail; school buses; vehicles operated by non-profit co-operative association transporting live stock, farm or dairy products for members; carriage of newspapers; private use, hiring being only casual or occasional; transportation of household effects of one who is changing his place of residence. The Supreme Court of Indiana sustains the law against the many contentions raised as to its illegality or unconstitutionality, affirming the judgment below denying injunction to prevent enforcement of the act. *Kelly v. Finney et al.,* 194 N. E. 157. Albert Ward and Fred E. Shick, both of Indianapolis, for appellant. Philip Lutz, Jr. of Boonville, and Joseph P. McNamara, and Joseph W. Hutchinson, both of Indianapolis, for appellees.

Kansas.

Amount of motor fuel tax due state from dealer is a debt due the state and in event of insolvency of dealer such debt does not have priority over other claims. The Kansas fuel oil tax is imposed on the dealer, measured by the amount of such oil purchased by him; he may charge to his customers. Bond to state to protect state against loss. Violations of act misdemeanor with prescribed penalties. Here, a receiver was appointed for an oil company dealer; such dealer had not paid to the state the amount of tax due it on account of motor fuel oil purchased by the dealer. The state filed its claim, contending that this should have priority over other claims. The Supreme Court of Kansas, affirms the judgment below allowing the claim on a pro rata basis and denying priority. The court says, citing authorities, that "under this statute, the dealer, by noncompliance with the statute, became liable to the state as for a debt;

also became liable to the penalties prescribed." "We may concede the people, by legislative enactment, had authority with respect to the tax in question to provide that, in the event a dealer in petroleum products neglected to pay the special tax on motor fuels, became financially embarrassed, and a receiver was appointed for his or its assets, the amount the dealer previously owed the state should be allowed by the receiver as a claim against such dealer, and the assets in the receiver's hands, to be paid prior to the payment of claims of common creditors. But the legislature has made no such provision. No contention is made in this case that it has made such a provision. Until it does so, the courts have no authority to require such priority of payment." *Sarver v. Sarver Oil Co.*, 40 P. (2d) 394. Roland Boynton, Atty. Gen., Walter T. Griffin, Asst. Atty. Gen. and Alex Hotchkiss of Lyndon for the State. N. C. Else and Hubert Else, both of Osborne, for appellee. O. D. Gregory, of Osborne, for creditors.

Michigan.

Michigan Chain Store Tax and Sales Tax Acts held valid. Act No. 265, Michigan Public Acts of 1933, imposes a sliding scale chain store license fee based on the number of stores. Up to three, the fee is $10. per store in excess of one; on each store in excess of 25, the fee is $250. Act No. 267, Michigan Acts of 1933, imposes a general sales tax measured by the amount of business done. The chain store tax is not applicable to filling stations. The Chain Store Tax Act was assailed as being unconstitutional for want to uniformity, because it is not an honest revenue measure but a punitive measure in disguise, because it deprives chain store employees of their liberty to engage in gainful occupation, because of excessive penalties, and because it results in double taxation on account of the general sales tax. The Supreme Court of Michigan sustains the Chain Store Tax Act against all contra contentions. It was urged that if the Chain Store Tax Act be held constitutional, then the General Sales Tax Act is unconstitutional because of the alleged resulting double taxation. The court says that the one tax is a license tax on the right to do business in more than one store, and the other tax is a privilege tax, measured by the amount of business done; this does not constitute "such double taxation as to render the General Sales Tax Law unconstitutional." *C. F. Smith Company et al. v. Fitzgerald et al.*, decided March 6, 1935. Commerce Clearing House Court Decisions Reporting Service, Requisition No. 132991.

Corrections

In the digest of the Michigan case of *Morlock v. Mt. Forest Fur Farms of America, Inc. et. al.*, 257 N. W. 880, which appeared on page 366 of the April, 1935, issue of **The Corporation Journal**, the reference in the twelfth line of the digest was to "the assets of the *Michigan* corporation" rather than to the assets of a Missouri corporation. On page 378 of the same issue, the reference in the seventh line to "Chapter 25, Laws of West Virginia, Extra Session, 1934" should have been to "Chapter 25, Laws of *Kentucky*, Extra Session, 1934."

CORPORATE MEETINGS HELD

During the past few weeks meetings of the corporations named below, among many others, have been held at the offices of The Corporation Trust Company.

The Quaker Oats Company
General Cable Corporation
Godchaux Sugars, Inc.
P. Lorillard Company
United Fruit Company
American Ice Company
United Carbon Company
American Austin Car Company
Air Investors, Incorporated
Vick Chemical, Inc.
The Croft Brewing Company
Loft, Incorporated
United Drug, Inc.
SKF Industries, Inc.
North American Aviation, Inc.
Transamerica Corporation
National Carloading Company
The Pennroad Corporation
General Outdoor Advertising Co., Inc.
Liggett & Myers Tobacco Company
Curtiss-Wright Airplane Company

Some Important Matters for May and June

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Notification Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters, requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ARIZONA—Report to Corporation Commission and Registration Fee due during June.—Domestic and Foreign Corporations.

ARKANSAS—Return of Information at the source due on or before May 15.—Domestic and Foreign Corporations.

DELAWARE—Annual Franchise Tax due between April 1 and July 1.—Domestic Corporations.

DOMINION OF CANADA—Annual Summary due between April 1 and June 1.—Dominion Companies.

FLORIDA—Annual Report and Fee due on or before July 1.—Domestic and Foreign Corporations.

ILLINOIS—Annual Franchise Tax due on or before July 1, but may be paid up to July 31 without penalty.—Domestic and Foreign Corporations.

LOUISIANA—Income Tax Return and Return of Information at the source due on or before May 15.—Domestic and Foreign Corporations.

MAINE—Annual Franchise Tax Return due on or before June 1.—Domestic Corporations.

MINNESOTA—Sworn Statement of Capital Stock due on or before July 1.—Foreign Corporations.

MISSOURI—Annual Franchise Tax due on or before May 15.—Domestic and Foreign Corporations.

Income Tax due on or before June 1.—Domestic and Foreign Corporations.

MONTANA—Annual Statement due within two months from April 1.—Foreign Corporations.

Annual License Tax based on net income due on or before June 15.—Domestic and Foreign Corporations.

NEBRASKA—Annual Report and Fee due on or before July 1.—Domestic Corporations.

NEVADA—Annual List of Officers and Designation and Acceptance of Resident Agent due on or before July 1.—Domestic and Foreign Corporations.

NEW MEXICO—Franchise Tax due on or before May 1.—Domestic and Foreign Corporations.

NEW YORK—Annual Franchise (Income) Tax Return (Form 3IT-Art. 9-A, Tax Law) due on or before July 1.—Domestic and Foreign Business Corporations.

NORTH CAROLINA—Annual Report (Capital Stock and Franchise Tax Report) due on or before July 1.—Domestic Corporations.

Annual Report to determine amount of franchise tax due on or before July 1.—Foreign Corporations.

OREGON—Annual Report due during June.—Domestic and Foreign Corporations.

RHODE ISLAND—Corporate Excess Tax due on or before July 1.—Domestic and Foreign Corporations.

TENNESSEE—Annual Report and Franchise Tax due on or before July 1.—Domestic and Foreign Corporations.

UNITED STATES—Second Installment of Income Tax due June 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

VIRGINIA—Income Tax due June 1.—Domestic and Foreign Corporations.

WASHINGTON—License Fee due on or before July 1.—Domestic and Foreign Corporations.

WEST VIRGINIA—License Tax Statement due on or before July 1.—Domestic Corporations.

Annual License Tax due on or before July 1.—Domestic and Foreign Corporations.

Fee to State Auditor as Attorney in Fact due on or before July 1.—Foreign Corporations and those Domestic Corporations whose principal places of business or chief works are located in other states.

WYOMING—Annual Statement and License Tax due on or before July 1.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

New Deal Laws of Importance to Corporations—Contains complete text of Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934, all matters in the original act omitted in the 1934 amendments being set in brackets, and all new matters added by the 1934 amendments being set in italics; complete text of the Securities Exchange Act of 1934; and complete text of the amendment approved June 7, 1934 to the Bankruptcy Act providing for corporate reorganizations.

The New Bankruptcy Law—Contains, first, the eleven-word amendment approved June 18, 1934 to the original amendment to the Bankruptcy Act approved June 7, 1934 (and published in our pamphlet New Deal Laws described above); second, two examples of voluntary petitions for reorganization under the new provisions; and third, two examples of petitions under the new provisions for appointment of trustees (reorganization sought).

The High Cost of Whistles for Corporations—Benjamin Franklin's classic, "The Whistle," here is shown, by the decisions in actual court cases, to have a very pointed application to some of the policies of some business corporations of our own day. A sixteen-page pamphlet for both laymen and lawyers.

Special Report—The Case Against Corporate Representation by Business Employes. Specific experiences of different corporations with the handling by untrained corporate representatives of such matters as service of process, notices of taxes due, filing of corporation reports, etc.

What Constitutes Doing Business. (Revised to April 15, 1934.) A 198-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages, for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation completely revised to reflect the changes made by the amendments of 1933.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

Questionnaire on Business Outside State of Organization. This is a form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.